85-974

No.

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOB HESS,

Petitioner,

v.

MARK TREECE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Dated: December 9, 1985

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QUESTION PRESENTED

Whether a public official can escape the mandate of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), which precludes recovery for defamatory falsehoods absent clear and convincing proof of actual malice, by characterizing his complaint as one for intentional infliction of emotional distress rather than defamation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	16
APPENDIX	

TABLE OF AUTHORITIES

Cases:	Page
Aspen Skiing Co. v. *Aspen Highlands Skiing Corporation*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 105 S. Ct. 2847 (1985)	6
Beckley Newspapers Corporation v. *Hanks*, 389 U.S. 81 (1967)	15
Bose Corporation v. *Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984)	5, 15
Bradley v. *Computer Sciences Corporation*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981)	7, 10
Coca-Cola Bottling Co. v. *Hubbard*, 203 F.2d 859 (8th Cir. 1953)	6
Coursey v. *Greater Niles Township Publishing Corporation*, 239 N.E.2d 837 (Ill. 1968)	8
Garrison v. *Louisiana*, 379 U.S. 64 (1964)	15
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	12
Goldman v. *Time, Inc.*, 336 F. Supp. 133 (N.D. Cal. 1971)	14
Greenbelt Cooperative Publishing Association v. *Bresler*, 398 U.S. 6 (1970)	15
Henry v. *Collins*, 380 U.S. 356 (1965)	8, 15
Hutchinson v. *Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979)	7, 13
In re IBP Confidential Business Documents, 755 F.2d 1300 (8th Cir. 1985)	10
McDonald v. *Smith*, 105 S. Ct. 2787 (1985)	10
McMillan v. *Meuser Material & Equipment Co.*, 260 Ark. 422, 541 S.W.2d 911 (1976)	6
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	*passim*
Old Dominion Branch No. 496 v. *Austin*, 418 U.S. 264 (1974)	14
Reader's Digest Association, Inc. v. *Superior Court*, 690 P.2d 610, 37 Cal. 3d 244, 208 Cal. Rptr. 137 (1984)	12
Rosenblatt v. *Baer*, 383 U.S. 75 (1966)	15
Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971)	14

TABLE OF AUTHORITIES—Continued

	Page
St. Amant v. *Thompson*, 390 U.S. 727 (1968)	8
Stern v. *United States Gypsum Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977)	10
Time, Inc. v. *Firestone*, 424 U.S. 448 (1976)	11
Time, Inc. v. *Pape*, 401 U.S. 279 (1971)	8
United States v. *Hylton*, 710 F.2d 1106 (5th Cir. 1983)	10
Webb v. *Fury*, 282 S.E.2d 28 (W. Va. 1981)	14
Statutes:	
28 U.S.C. § 1257(3)	2
United States Constitution:	
First Amendment	*passim*
Fourteenth Amendment	2

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OCTOBER TERM, 1985

No.

BOB HESS,

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v.

MARK TREECE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The petitioner, Bob Hess, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on July 15, 1985.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas and the dissenting opinion of Justice Purtle, reported at 286 Ark. 434, 693 S.W.2d 792 (1985), are reprinted as Appendices A and B to this Petition. The unreported opinion of the Special Master, adopted by the Circuit Court of Pulaski County, Sixth Division, Arkansas, in denying petitioner's motion for judgment notwithstanding the verdict, is printed as Appendix E.

JURISDICTION

The Supreme Court of Arkansas filed its opinion and entered its judgment on July 15, 1985. A timely petition for rehearing was denied, without opinion, on September 9, 1985, and this petition for a writ of certiorari is being filed within 90 days of that date. A copy of the Order denying the petition for rehearing is printed as Appendix C to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On May 6, 1983, respondent Mark Treece, a Little Rock Police Officer, filed a complaint in the Circuit Court of Pulaski County, Arkansas, against petitioner Bob Hess, a Little Rock City Director. In an eight-paragraph complaint that did not label or distinguish between any separate causes of action, Treece alleged that Hess had "slander[ed]," "harassed," and "engaged in intentional, reckless, and out-

rageous conduct towards" him. App. G, at 25a-26a. In particular, Treece alleged that:

> Hess had "contacted the plaintiff's supervisors on numerous occasions demanding investigation of the plaintiff's personal and professional conduct resulting in numerous unwarranted investigations and severe emotional distress . . . ." Complaint ¶ III.
>
> Hess had "harassed the plaintiff by following the plaintiff on numerous occasions and placing him under constant surveillance . . . ." Complaint ¶ IV.[1]
>
> Hess had "contacted numerous public officials in the City of Little Rock in an attempt to discredit the plaintiff's reputation and in a willful and intentional attempt to encourage the Little Rock Police Department to terminate the plaintiff's employment." Complaint ¶ V.
>
> Hess had "made numerous slanderous statements to Little Rock Police Officers, public officials, and citizens of the City of Little Rock, said statements being untrue and detrimental to the plaintiff's character . . . ." Complaint ¶ VI.

App. G, at 25a-26a. Treece did *not* allege that Hess had made any of these complaints or statements with "actual malice," that is, with knowledge of falsity or reckless disregard for the truth. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964).[2]

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[1] See note 7, *infra*.

[2] Treece subsequently amended his complaint to allege with greater specificity the instances in which Hess allegedly made "unfounded complaints" to Treece's supervisors and attempted to monitor Treece's conduct. App. H, at 28a-29a.

Hess moved to dismiss the complaint and, alternatively, for summary judgment on the ground, *inter alia*, that Treece was a public official and could not recover damages without alleging and proving that the challenged statements were made with "actual malice" under *New York Times*. Arkansas Supreme Court Record ("R.") 12. The trial court held that the complaint failed to state a cause of action for harassment, and thereafter entered an order stating, *inter alia*, that:

> Plaintiff's slander cause of action will be withdrawn and not submitted to the jury for its consideration. Plaintiff has further indicated that he will attempt only to pursue his cause of action for intentional infliction of mental distress.

App. D, at 19a. Hess then renewed his motion to dismiss and for summary judgment as to the claim of intentional infliction of mental distress, reincorporating the arguments made in support of the original motion. R. 123. The trial court denied the motion, R. 170, and a jury trial commenced the following day.

Most of the testimony at trial centered on the complaints Hess made to Treece's supervisors in the police department about Treece's official conduct, and the effect that the resultant investigations had on Treece. The essence of Hess' complaints was that Treece was working at a part-time "off-duty" job at the same time he was officially "on-duty" as a police officer employed by the city. R. 461, 542. Treece also attempted to show that Hess had a "grudge" against him and had indicated a desire to "get Treece fired" to several people. R. 432; App. A, at 6a. But no evidence was introduced to show that Hess made any complaint about Treece while knowing it to be false

or entertaining serious doubts as to its truth. *See Bose Corporation* v. *Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1965 n.30 (1984). In fact, the same officers who described Hess' complaints to the police department and his apparent "grudge" against Treece also testified that there was nothing to indicate Hess did not "sincerely believe" that his complaints were valid. R. 436, 551-52, 553.

Upon the close of Treece's case, counsel for Hess moved for a directed verdict. He argued, *inter alia*, that Hess had a legal right and qualified privilege to make complaints against a public official and that, absent proof that these complaints "were not made in good faith,"[3] the plaintiff "cannot sustain . . . any kind of cause of action that would arise out of making [the] complaints." R. 732. Counsel specifically argued that "to submit this case to the jury on complaints being made to Officer Treece's supervisors would constitute a violation of Mr. Hess' First Amendment right to freedom of speech, freedom of expression and freedom of movement." R. 735.

The trial court denied the motion for directed verdict, R. 783, and the jury subsequently returned a verdict awarding Treece $25,000 in compensatory damages and $50,000 in punitive damages.[4] Hess

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[3] The "actual malice" test of *New York Times* is one of subjective "good faith." *St. Amant* v. *Thompson*, 390 U.S. 731, 732 (1968).

[4] Trial counsel did not request a jury instruction that the plaintiff was required to prove knowledge of falsity or reckless disregard for the truth, but it was unnecessary for him to request such an instruction in order to preserve the point raised in the Arkansas Supreme Court and in this Court. The contention is not that a jury instruction was improperly

promptly filed a motion for judgment notwithstanding the verdict, reincorporating the legal authorities cited in support of his original motion to dismiss, and reasserting that "as a matter of law the Defendant cannot be held liable for engaging in conduct which he had a legal right to do, *i.e.*, complain in good faith to proper authorities about the conduct of Officer Mark Treece." R. 180-81. The trial court denied the motion on the recommendation of a special master. App. E, at 22a; App. F, at 24a.

On appeal to the Supreme Court of Arkansas, Hess argued, *inter alia*, that the judgment violated Hess' rights "under the First Amendment to the United

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denied, but that the case should not have been submitted to the jury because of the total absence of any allegation or proof of actual malice. It is therefore immaterial whether the jury was properly instructed. As the Tenth Circuit held in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 105 S. Ct. 2847, 2856 n.26 (1985), raising an issue on a motion for a directed verdict

> preserved defendant's opportunity to challenge the sufficiency of the evidence on that issue under the truly controlling law, regardless of defendant's failure to object to the jury instructions [concerning the disputed legal issue]. The Fifth, Seventh and Eighth Circuits have held that "[a] proper motion for a directed verdict and its denial will always preserve for review the question whether *under the law truly applicable to the case* there was an adequate evidentiary basis for the submission of the case to the jury."

738 F.2d at 1517-18 (emphasis by the court) (quoting *Coca-Cola Bottling Co.* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)). *See also McMillan* v. *Meuser Material & Equip. Co.*, 260 Ark. 422, 541 S.W.2d 911, 913 (1976) (issue argued in motion for directed verdict held sufficiently raised at trial level to permit review by Arkansas Supreme Court).

States Constitution." Appellant's Brief at 367. Hess contended that Treece was a public official, *id.* at 352, and that because the case was governed by *New York Times Co.* v. *Sullivan*, "an action cannot be maintained under the circumstances of this case without an allegation and proof of actual malice, i.e., proof that the complaints were false and that Appellant had actual knowledge of the falsity of the complaints or acted with reckless disregard of the truth." *Id.* at 368.[5]

The Supreme Court of Arkansas found that "none" of the points raised by Hess "constitute[d] error and accordingly affirm[ed]" the judgment. App. A, at 1a. The court rejected Hess' argument "that as a private citizen he was privileged to complain to authorities about the conduct of public officials," noting only that "[t]he fact that Mark Treece happened to be a city employee should not deprive him of protection from outrageous conduct . . . ." App. A, at 6a.

REASONS FOR GRANTING THE PETITION

The courts of the State of Arkansas failed altogether to recognize the important First Amendment interests at stake in this case. They refused to apply the mandate of *New York Times Co.* v. *Sullivan*, 376

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[5] In addition to *New York Times Co.* v. *Sullivan*, Hess relied on *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981) (First Amendment right to petition for redress of grievances requires qualified privilege for complaints about government officials), and *Hutchinson* v. *Proxmire*, 579 F.2d 1027, 1036 (7th Cir. 1978) (claim for intentional infliction of emotional anguish subject to same constitutional limitations as defamation claim), *rev'd on other grounds*, 443 U.S. 111 (1979). Appellant's Brief at 368.

U.S. 254, 280 (1964)—that public officials must show "actual malice" to recover for defamatory falsehoods —for the apparent reason that the plaintiff did not label his claim "defamation," but rather "intentional infliction of emotional distress."

The Arkansas courts, in other words, allowed a public official to circumvent the *New York Times* rule merely by changing the name of the tort alleged. That result conflicts with the decisions of this Court and other courts, which extend the protection of the First Amendment to all tort claims based upon speech, no matter how they are characterized. The judgment of the Supreme Court of Arkansas therefore warrants this Court's review.

1. In *New York Times*, this Court held that the First Amendment guarantees of free expression require "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. That rule is fully applicable to this case.[6]

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[6] Neither Treece nor the courts below disputed Hess' contention that Treece is a "public official" under *New York Times*. Treece was a police officer of the City of Little Rock. In *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), and *Henry* v. *Collins*, 380 U.S. 356 (1965), this Court treated police officers as public officials. The Illinois Supreme Court stated the rationale for that result in *Coursey* v. *Greater Niles Township Pub. Corp.*, 239 N.E.2d 837, 841 (Ill. 1968):

> Although as a patrolman he is "the lowest in rank of police officials" and would have slight voice in setting

The gravamen of Officer Treece's complaint was that he suffered injury as a result of "unfounded" complaints made by Hess to Treece's superiors and other government officials. App. G, H at 26a, 28a-29a.[7] The speech at issue—criticism of a public official directed to his superiors—lies at the core of the First Amendment. Such criticism is entitled not only to the protection of the free speech provision, but also to the

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departmental policies, his duties are peculiarly "governmental" in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially, at an "on the street" level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.

[7] Treece also alleged that Hess attempted to place him under surveillance, but most of the evidence at trial focused on Hess' complaints to Treece's supervisors and the resultant internal investigations. Treece testified that the frequency of Hess' complaints and the resultant investigations caused him distress by interfering with his ability to do his job and causing him to fear for the future of his career. R. 695, App. A, at 3a. In short, he sought damages on the basis of Hess' criticism of his conduct as a police officer. The jury was permitted to impose liability on that basis. And the Supreme Court of Arkansas upheld the award of damages on that basis, noting that "[t]here was ample evidence to show that Hess was the moving force behind the *repeated police investigations* of *Treece* . . . ." App. A, at 6a (emphasis added).

independent protection of the First Amendment right to petition the government for redress of grievances.[8] That separate right underscores the requirement that "actual malice" be alleged and proven. *McDonald* v. *Smith*, 105 S. Ct. 2787, 2794 (1985) (Brennan, J., concurring) ("expression falling within the scope of the Petition Clause [is] fully protected by the actual-malice standard set forth in *New York Times Co.* v. *Sullivan*").[9] *Accord*, *In re IBP Confidential Business Documents*, 755 F.2d 1300, 1314-15 (8th Cir. 1985).

2. The Arkansas Supreme Court apparently concluded that the actual malice standard of *New York Times* was inapplicable because Treece's claim was not for "defamation," but for "outrageous conduct" or "intentional infliction of emotional distress." The fact that Treece "happened to be a city employee," the court stated, "should not deprive him of protection from outrageous conduct . . . ." App. A, at 6a. A claim of "outrageous conduct" or "intentional infliction of emotional distress" based upon criticism of official conduct, however, is surely subject to the rule

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[8] *See United States* v. *Hylton*, 710 F.2d 1106, 1111-12 (5th Cir. 1983); *Bradley* v. *Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981); *Stern* v. *United States Gypsum Inc.*, 547 F.2d 1329, 1342-43 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977).

[9] In *McDonald* v. *Smith*, 105 S. Ct. 2787 (1985), this Court held that the petition clause of the First Amendment did not require an *absolute* privilege against liability for defamatory statements made in petitioning the government. The Court noted that the state common law under which the plaintiff had brought his action would permit recovery only upon a showing of "malice," which the courts of that state had defined in a manner intended to be consistent with the rule of *New York Times Co.* v. *Sullivan*. 105 S. Ct. at 2791.

of *New York Times*. Changing the label on the tort does not change the First Amendment principles at stake.

In *New York Times*, the Court concluded that allowing a public official to recover "damages for a defamatory falsehood" absent proof of actual malice would deter "would-be critics of official conduct . . . from voicing their criticism." 376 U.S. at 279. This deterrent effect is the same whether liability is imposed on a traditional defamation claim or on some other claim such as "outrageous conduct," whether the damages sought are for reputational injury or for some other injury such as "emotional distress." Indeed, if defamatory statements made without actual malice were subject to civil liability under legal theories other than defamation, it would serve no purpose to prohibit recovery under a theory of defamation. And if proof of actual malice is necessary in a defamation action to prevent self-censorship of protected speech, such proof must be required under alternative legal theories as well.

This Court's decision in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), makes clear that the constitutional requirements of *New York Times* and its progeny are not limited to damage claims based on injury to reputation, but apply equally to those (like Treece's) based on alleged emotional distress. The plaintiff in *Firestone*, like Treece, withdrew her claim for damage to reputation shortly before trial and sought recovery only for mental anguish. This Court held that the plaintiff was "not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her," simply because she withdrew her claim for damage to repu-

tation. 424 U.S. at 460. But the Court also made clear that the constitutional limitations upon recovery remained:

> Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated *consistently with the Constitution* upon a showing of fault.

Ibid. (emphasis added). The Court vacated the state court's judgment, which had affirmed the jury's award of damages, because there was no finding of fault as required by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). 424 U.S. at 461-64.

The Court in *Firestone* applied the more limited First Amendment protections of *Gertz*, because the plaintiff was a private figure. But the principle embraced by the Court was clear: the constitutional restrictions on recovery of damages due to defamatory falsehoods are applicable regardless of whether the plaintiff seeks recovery for injury to reputation or, as in this case, for other forms of injury such as "personal humiliation, mental anguish and suffering." 424 U.S. at 460.

Precisely the same principle has been applied with consistency by the state and federal courts. In *Reader's Digest Association, Inc.* v. *Superior Court*,

690 P.2d 610, 37 Cal.3d 244, 208 Cal. Rptr. 137 (1984), the plaintiffs brought an action for libel, intentional infliction of emotional distress, and invasion of privacy. The California Supreme Court held that all three claims were barred by the *New York Times* rule:

> The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. *That constitutional protection does not depend on the label given the stated cause of action*; it bars not only actions for defamation, but also claims for invasion of privacy. Dederich's cause of action for intentional infliction of emotional distress presents an issue of first impression, but fails for the same reason as his causes of action for defamation and privacy: *liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.*

690 P.2d at 624 (citations omitted) (emphasis added).

The United States Court of Appeals for the Seventh Circuit reached the same conclusion in *Hutchinson* v. *Proxmire*, 579 F.2d 1027, 1036 & n.16 (7th Cir. 1978), *rev'd on other grounds*, 443 U.S. 111 (1979). The plaintiff in that case alleged a number of torts—including libel, intentional infliction of emotional anguish, invasion of privacy, and interference with contractual relations—based on a published criticism of his federally-funded research. In upholding summary judgment for the defendants on all counts, the court of appeals held that the non-defamation claims were subject to the same constitutional limitations as the defamation claim. It viewed the different allegations of harm "as merely the results of the statements made by the defendants," and con-

cluded: "If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they caused." 579 F.2d at 1036. *See also Goldman* v. *Time, Inc.*, 336 F. Supp. 133, 137-38 (N.D. Cal. 1971) ("a plaintiff cannot avoid the impact of the *New York Times* rule merely by labelling his action as one for invasion of privacy rather than libel"); *Webb* v. *Fury*, 282 S.E.2d 28, 37 (W. Va. 1981) (protection of right to petition for defamatory statements applies "regardless of the underlying cause of action asserted by the plaintiffs").

In sum, there can be no doubt that the plaintiff's claim of emotional distress based upon Hess' criticisms of his official conduct is governed by the actual malice standard of *New York Times*. The failure of the Arkansas courts to recognize that was clear error.

3. The plaintiff in this case made no attempt at any stage of the proceedings to allege, prove or even argue the existence of actual malice—that is, knowledge of falsity or reckless disregard for the truth. Indeed, as Justice Purtle noted in his dissent: "There was no proof that any of [Hess'] complaints about [Treece] was untrue." App. B, at 15a.

Instead, Treece focused entirely on Hess' *motivation* in making the complaints, attempting to prove that Hess "had a grudge" against him and wanted to get Treece fired. R. 432. Evidence to that effect, however, is insufficient as a matter of law. This Court has repeatedly held that "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 164, 281 (1974), quoting *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52

n.18 (1971) (Opinion of Brennan, J.).[10] As the Court emphasized recently in *Bose Corporation* v. *Consumers Union of United States, Inc.*, 104 S. Ct. at 1965 n.30:

> The burden of proving "actual malice" requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.

Because there was no such evidence of actual malice, indeed no such allegation, the judgment violates the First Amendment.

4. The constitutional issue in this case is of unquestionable importance to the protection of free speech. And the Arkansas Supreme Court's disposition of that issue is in clear conflict with *New York Times* and its progeny. Under the circumstances, the Court may regard summary reversal as an appropriate disposition.

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[10] *See also Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 10 (1970); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 (1966); *Henry* v. *Collins*, 380 U.S. 356, 357 (1965); *Garrison* v. *Louisiana*, 379 U.S. 64, 73 (1964).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Page
A. Opinion of the Supreme Court of Arkansas, July 15, 1985	1a
B. Dissenting Opinion of Justice Purtle of the Supreme Court of Arkansas, July 15, 1985	13a
C. Order of the Supreme Court of Arkansas denying Petition for Rehearing, September 9, 1985	18a
D. Pre-trial Order of the Circuit Court of Pulaski County, Arkansas, April 24, 1984	19a
E. Master's Report, August 3, 1984	21a
F. Order of the Circuit Court of Pulaski County denying Motion for Judgment Notwithstanding the Verdict, August 3, 1984	24a
G. Complaint, May 6, 1983	25a
H. First Amendment to Complaint, April 6, 1984	28a

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 84-274

BOB HESS,

Appellant,

v.

MARK TREECE,

Appellee.

[Filed July 15, 1985]

Appeal from Pulaski Circuit Court,
Sixth Division, (83-3240)
Gordon S. Rather, Jr., Special Judge

GEORGIA ELROD, Special Chief Justice. This case involves the tort of outrage. Mark Treece, a Little Rock police officer, sued Bob Hess, a building contractor and Little Rock City Director, claiming that Hess had, over a period of some two years, engaged in intentional and outrageous conduct directed toward Treece, which resulted in the infliction of severe mental and emotional distress. The jury found for the appellee Treece and awarded $25,000 in compensatory and $50,000 in punitive damages.

Appellant raises fourteen points on appeal. Although several merit discussion, we find none constitutes error and accordingly affirm.

Appellee Mark Treece had been an employee of the Little Rock Police Department since 1973, and, during the period in question, was assigned to traffic services on the motorcycle squad. In late 1980 he met appellant Bob Hess when he dropped off Jayma Stephens, Hess' girlfriend, at Hess' house and some unfriendly words were exchanged between the parties. Around the time of this encounter Jayma Stephens began keeping company with Gary Wheat, Treece's best friend, who was also a police officer, and these relationships appear to have been the springboard for Hess' animosity toward Treece. Treece testified that in April 1981 he saw Hess following him. In Spring 1982 Treece was informed by one of his superior officers, Capt. Timothy Daley, that Hess had called the Police Department to complain about Treece being at his apartment when he was supposed to be at work. During this conversation, according to Daley, Hess stated that he would have Treece's job at any cost, and that he was conducting surveillance of Treece and other officers. An internal police investigation of this complaint found Treece innocent of the charges.

In April 1982 Treece learned that Hess had lodged another complaint against him, this time for working an off-duty job at Pulaski Academy when he should have been on duty. Treece had been given permission to work the Pulaski Academy job, but not while he was on duty for the Police Department. Treece again underwent an internal investigation and was suspended for three days, although it appears this was largely because he made false statements to the investigators. Treece also testified that he was called upon by his superiors frequently during the two years in question to account for his time, and that it was hard for him to do his job properly when he felt constantly scrutinized.

In April 1982 Treece talked to Mary Ann Haston, who was Hess' occasional bookkeeper. She told Treece that Hess had asked her to watch and report on Treece's movements.

A number of police officers testified during the trial. Captain Daley recounted the hour-long conversation he had with Hess, stating that it was apparent to him that Hess had a grudge against Treece. In his personal investigations of Treece, Daley never found any wrongdoing. Lt. Albert Benafield stated that he was called upon frequently, "sometimes twice a week", to investigate Treece's conduct and that "it caused a lot of problems in my department." Lt. C. R. Watters stated that he investigated Treece on several occasions in connection with his Pulaski Academy job and never found any wrongdoing. E. J. Etheridge testified that he had been directed to conduct numerous investigations of Treece, sometimes on a daily or weekly basis. Jess Hale, Assistant Chief of Police in 1982, and Mahlon Martin, then City Manager, were both personally contacted by Hess concerning his complaints against Treece.

Mary Ann Haston, who lived in the same apartment complex as Treece, testified that Hess paid her to report on Treece's whereabouts; that he frequently called the Police Department from her apartment to complain about Treece, and that he stated that he would spend every dime he ever made to get Treece fired.

On the issue of damages, Treece testified that the frequency of the complaints and resultant investigations interfered with his ability to do his job; that he became concerned for the safety of his family and instituted security measures; and that he changed his lifestyle because of his fear. Several police officers commented that Treece appeared distraught, nervous and frightened during this period of time and that he had asked for help.

Hess admitted that he had filed complaints against Treece but denied the alleged frequency. He denied having paid Mary Ann Haston to watch Treece and disputed Capt. Daley's recollection of the phone conversation. Hess admitted that he had contacted Gene Nail, an investiga-

tive reporter for the *Arkansas Democrat*, to look into the situation at Pulaski Academy and admitted he had "bad feelings" toward Treece.

Appellant contends that there was no substantial evidence to support the jury finding of intentional infliction of mental distress. On appeal we must view the evidence in the light most favorable to the appellee, Mark Treece. *B. J. McAdams, Inc. v. Bess Refrigeration, Inc.*, 265 Ark. 519, 579 S.W.2d 608 (1979).

This Court first defined the tort of extreme outrage in *MBM Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980):

> . . . [O]ne who by extreme and outrageous conduct willfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress.
>
> The emotional distress for which damages may be sought must be so severe that no reasonable person could be expected to endure it.
>
> By extreme and outrageous conduct, we mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society. See Restatement of the Law, Torts 2d 72, § 46, Comment d.

In *MBM Co. v. Counce*, supra, an employee who was suspected of stealing was told she was being laid off because there were too many employees. She was later required to take a polygraph test and, although she passed, her last paycheck reflected a deduction for the missing money. Her employer then caused her to be denied unemployment benefits. We held that the trial court's granting of summary judgment in favor of the employer was error and that a fact question was made.

We next examined the tort of outrage in *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982), again on appeal of a summary judgment in favor of the employer, and here found that the conduct complained of did not rise to the level of outrageous. In *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), also involving alleged outrageous conduct in the employer/employee context, we found that there was substantial evidence to support a finding of outrage, but we reversed on other grounds. In this case, the employee was subjected to an intense and lengthy interrogation on his handling of the store's operations. His employer refused to permit him to take his medication during the interrogation, even though he knew of the employee's lack of emotional stamina and the fact that he was on regular medication for this problem.

We also found outrageous conduct in *Growth Properties I v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984). The owner of a cemetery, in constructing a new crypt, moved heavy equipment across the graves of plaintiff's relatives which caused exposure of their vaults. The damage could have been avoided by the use of an alternate access route, and we found that these acts of careless and callous disregard fit within the definition of outrage.

Although we have emphasized that the recognition of this tort is not intended to "open the doors of the courts to every slight insult or indignity one must endure in life", *Tandy Corp. v. Bone*, supra, we find that the facts in the case before us meet the requirements we have set down.

The fact situations in the cases cited above all involved either acts or conduct of limited duration in time. Bob Hess' actions directed against Mark Treece continued over a period of two years or more. He made not one complaint, but many; he not only followed Treece him-

self but had others follow him; he communicated his threats to "get Treece fired" via more than one source. Except for the one incident when Treece was suspended for three days, primarily for giving a false statement to the investigators and not for working another job while on duty, no misconduct was found. Nor can we agree with Hess' contention that his actions were not the proximate cause of any emotional distress suffered by Treece. There was ample evidence to show that Hess was the moving force behind the repeated police investigations of Treece, and the fact that there was little face-to-face contact between the two men does not prevent a finding of proximate cause.

Hess argues that as a private citizen he was privileged to complain to authorities about the conduct of public officials, and that as a member of the Board of Directors he was entitled to a qualified immunity for discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The claim of immunity is, however, subject to the requirement of good faith, and the question of good faith is one for the jury. *McMillion v. Armstrong*, 238 Ark. 115, 119, 378 S.W.2d 670, 673 (1964). In fact, the jury could have found that Hess' conduct became even more outrageous after he took office as City Director in January of 1983, thus acquiring a position of greater influence, if not actual authority, over city employees. The fact that Mark Treece happened to be a city employee should not deprive him of protection from outrageous conduct; nor should the fact that Bob Hess happened to be a City Director relieve him of responsibility for his actions.

We therefore find substantial evidence to support the verdict of outrageous conduct and also to support the award of damages, both compensatory and punitive.

Appellant's next argument for reversal is that the trial court failed to instruct the jury properly on the issue of

punitive damages. The court gave AMI 2217, and we have held that this instruction is not proper in a case of intentional tort. *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979); *Tandy Corp. v. Bone*, *supra*. Before appellant can raise this issue on appeal, however, he must have made a proper, specific objection to the instruction in the trial court. A.R.C.P. Rule 51. Appellant's objection to the instruction was:

> I have the same objection on that instruction, Your Honor. I don't believe that the evidence supports giving that instruction. I think the plaintiff's counsel is confusing motive with malice, and a person's motive for making a complaint is irrelevant and I don't think supports a punitive damage instruction. So I feel that the evidence is insufficient.

Appellant did not submit a proposed instruction on punitive damages, and his objection was general, not specific. An objection which merely complains that a jury instruction is an incorrect declaration of the law is a general objection, reserving no point for review. *AAA TV & Stereo Rentals, Inc. v. Crawley*, 284 Ark. 83, 679 S.W.2d 190 (1984); *CBM of Central Arkansas v. Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981); *Chandler v. Kirkpatrick*, 270 Ark. 74, 603 S.W.2d 406 (1980).

Appellant contends that the trial court erred in admitting certain police reports into evidence. The trial court admitted under the "business records" exception to the hearsay rule, Unif. R. Evid. 803(6): (1) a report made by Lt. Tim Daley to his superior concerning the telephone conversation he had with Hess in March, 1982; (2) Lt. Benafield's memo to Lt. Daley responding to a request for investigation on Treece's schedule; and (3) Sgt. Watters' memo to Lt. Benafield objecting to the frequency of complaints by Hess. Appellant argues that the reports were inadmissible under Unif. R. Evid. 803(8)(i),(iv) and (v), which prohibit the introduction of investigative reports by police and other law enforce-

ment personnel, factual findings resulting from special investigation of a particular complaint, case or incident, or any matter as to which the source of information or other circumstances indicate lack of trustworthiness. Although these reports may not technically have come within the business records exception, the trial court has substantial latitude under Rule 803(24) to admit evidence which it feels meets the spirit of the rule. In each instance the report was submitted through its author, who was subject to cross examination on its contents. In addition, many of the statements in the Daley memorandum to which appellant objected were admissions, e.g. "He [Hess] further stated that he hates the sight of all police officers. . . .", and were thus not hearsay under Rule 801(2). We, therefore, cannot say that the trial court erred in admitting this evidence.

Appellant further contends that the trial court erred in admitting certain evidence contrary to the directives of a pretrial order. On April 24, 1984, Judge David Bogard entered a pretrial order which provided that: (1) information from plaintiff's tax returns was not to be introduced into evidence at the trial until the court decided preliminarily that a submissible issue of punitive damages had been esablished, and that (2) the contents of a police investigative file, or the nature of the investigation would not be referred to or offered at trial until relevance had been established to the court's satisfaction. The police investigative file related to the theft and burning of an automobile in which Bob Hess had an interest. A.R.C.P. Rule 16 provides:

> The court shall make an order which recites the action taken at the conference, . . . and the agreements made by the parties as to any of the matters considered . . .; and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

Although the pretrial order was entered by Judge Bogard, the case was tried before Special Circuit Judge Gordon Rather. At trial when appellee's counsel broached the subject of the income tax returns, appellant's counsel objected and a conference was held in chambers, the court ruling that sufficient evidence had been produced to submit the question of punitive damages to the jury; hence, the income tax returns were admissible. With regard to the police investigative file, no such file was ever introduced, and the court specifically limited questioning on the issue of the stolen and burned car. Although some confusion might have been eliminated had the same judge handled the case from beginning to end, we cannot say that there was any abuse of discretion by the trial judge in admitting this evidence.

Appellant's next point involves the trial court's admission of Mary Ann Haston's testimony concerning a telephone conversation she had with appellant. She said appellant said that Bob Troutt, a man who was convicted of beating a radio disc jockey in a well-publicized trial, had pulled up on his motorcycle and that he (appellant) was going to have "Treece taken care of" and "a car set on fire and burned". Appellant argues this is inadmissible character evidence under Unif. R. Evid. 404, and that it is irrelevant under Rule 403. Rule 404(b) permits the introduction of character evidence to show motive or intent, and Rules 401 and 402 define and permit the introduction of relevant evidence. The trial court's determination of relevance will not be reversed unless this court finds an abuse of discretion. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980). *Arkansas Power & Light Co. v. Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976). We find no abuse of discretion.

Appellant next argues the trial court erred in limiting appellant's cross-examination of the witness Mary Ann Haston concerning felony false pretense convictions which were entered more than ten years prior. At trial appel-

lant asked the witness whether she had ever been convicted of anything, and she responded "no". He then sought to introduce certified copies of Pulaski County Circuit Court records showing she had been convicted on two counts of felony false pretenses in 1965. He contends that the records were offered not to impeach her character but to contradict her testimony. Unif. R. Evid. 609 provides that evidence of a prior conviction is not admissible if a period of ten years has passed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date. Rule 609 makes no distinction between impeachment of character and contradiction of testimony, and we therefore conclude the trial court was correct in excluding this evidence.

Appellant cites as error the trial court's refusal to give his requested instruction on the burden of proof. He contends that a higher burden of proof is required in cases involving the tort of outrage, and offered this instruction:

> The party having the burden of proof on a proposition must establish it by clear evidence or proof. "Clear evidence" means evidence which is positive, precise and explicit and which tends directly to establish the proposition. That is, whether the proposition has been proved by a high probability.
>
> "Clear evidence" is not necessarily established by the greater number of witnesses testifying to any fact or state of facts.

Appellant cites *Givens v. Hixson*, 275 Ark. 370, 631 S.W. 2d 263 (1982) in support of his requested instruction. The trial court refused the instruction and gave instead AMI 202, stating that a preponderance of the evidence is the appropriate standard. Although in *Givens v. Hixson*, supra, we emphasized the need for "clear-cut proof", we did not raise the level of proof required beyond a pre-

ponderance of the evidence, which has consistently been the required standard in civil cases. *McWilliams, et al.* v. *Neill*, 202 Ark 1087, 155 S.W.2d 344 (1941).

Appellant contends that the trial court erred in failing to grant appellant's motion for summary judgment on the grounds that appellee failed to attach affidavits or depositions to his response to the motion sufficient to show the existence of a genuine issue of material fact. The exhibits attached to appellant's motion itself, however, were more than sufficient to show a factual dispute between the parties, and summary judgment would not have been an appropriate disposition of the case. See A.R.C.P. Rule 56(c).

Appellant's next two points involve a witness who never testified, Lavonia Gray, a man who at the time of trial was serving time at Cummins Prison and who was subpoenaed to the courthouse as a possible witness by plaintiff's counsel while the trial was in progress. Although the trial court refused to permit Gray's testimony and he was therefore never before the jury, his presence in the courthouse attracted attention from the news media covering the trial and a television newscast described Gray, a convicted arsonist of some notoriety, as a possible witness. Appellant's motion to the court to poll the jurors to see whether any had seen the news broadcast was denied, and he cites this refusal as error. The record shows that the trial judge repeatedly admonished the jurors not to discuss the trial, read newspaper articles about it, or watch television reports. Appellant submitted no evidence that any of the jurors had seen the broadcast, seen Lavonia Gray in the courthouse, or been improperly influenced in any way. The party raising the issue of improper influence must show that it exists. *Hutcherson v. State*, 262 Ark. 535, 558 S.W.2d 156 (1977). At the courthouse, while the trial was in recess, Lavonia Gray gave a sworn statement to appellee's counsel that he had been contacted by Bob Troutt to "get

rid of a car" for him. Appellee then sought to call Gray as a rebuttal witness, but the trial court refused. Subsequent to the conclusion of the trial, Gray recanted his earlier statement, and appellant argues that this admission of perjury by Gray constitutes sufficient newly discovered evidence to warrant a new trial. The trial court denied the motion for a new trial, for the reason that Gray's testimony was never received into evidence, and his later contradiction, therefore, could have had no effect on the outcome of the trial. We agree.

Appellant also contends that the conduct of appellee's counsel during the trial was so prejudicial to the rights of appellant that he was denied a fair and impartial trial and that a new trial should be ordered. As the record reflects, both parties were zealously and energetically represented by their respective attorneys. The trial was a lengthy, emotional process for all concerned. We find nothing, however, to show that appellee's counsel overstepped permissible bounds to the point of unfair prejudice to appellant and uphold the finding of the trial court that grounds for a new trial were not shown.

Affirmed.

George Rose Smith and Purtle, J.J., dissent.

HOLT, C.J., NOT PARTICIPATING.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 84-274

Opinion Delivered July 15,1985

BOB HESS,

Appellant,

v.

MARK TREECE,

Appellee.

[Filed July 15, 1985]

Appeal From Pulaski County Circuit Court,
6th Div. (83-3240);
Hon. Gordon S. Rather, Jr., Special Circuit Judge.

Dissent.

John I. Purtle, Associate Justice.

In my opinion the only outrage to be found in this case is the majority opinion. The present case seems to attempt to embrace the torts of bad faith, interference with a contract, intentional infliction of emotional distress (outrage), negligence, slander, and perhaps libel.

The tort of bad faith had its genesis in automobile liability cases where insurers acted in bad faith in not settling personal injury claims. Although the "bad faith"

doctrine may have started in California, we recognized it in *Tri-State Insurance Co. v. Busby*, 251 Ark. 568, 473 S.W.2d 893 (1971). In *Busby* we held that an insurance company was liable in excess of its policy limits if it had failed, due to "fraud, bad faith, or negligence," to settle within the policy limits. To the same effect see *Members Mutual Insurance Co. v. Blissett*, 254 Ark. 211, 492 S.W. 2d 429 (1973). The tort of bad faith in refusing to settle with an insured pursuant to the terms of a fire insurance policy was approved in the case of *Aetna Casualty & Surety v. Broadway Arms*, 281 Ark. 128, 664 S.W. 2d 463 (1983).

So far as I can determine, the tort of intentional infliction of emotional distress was first recognized in Arkansas in the case of *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980). In *M.B.M.* we stated: "[W]e . . . do now recognize that one who by extreme and outrageous conduct wilfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress . . . . By extreme and outrageous conduct, we mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." There was no award of damages in *M.B.M.* because the case came to us on appeal from a summary judgment dismissing the cause of action. We reversed and remanded. We did approve an award of actual and punitive damages for the tort of outrage in *Growth Properties I v. Cannon*, 282 Ark. 472, 669 S.W.2d 447 (1984). The outrageous act in *Cannon* was the defendants' use of part of a burial plot as a road during construction, thereby exposing and driving upon the vaults of plaintiffs' deceased relatives. Repeated traffic across the burial plot was indeed something beyond the bounds of decency. However, in the earlier case of *Givens v. Hixson*, 275 Ark. 370, 631 S.W. 2d 263 (1982) we upheld a summary judgment against

the plaintiff who had alleged in his complaint that he had been the victim of an intentional infliction of emotional distress by having his employment terminated publicly, abruptly, and without good reason. In *Givens* we again stated the tort of outrage could be established where the conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

If we take every allegation of the complaint as fully proven at the trial, there still are no grounds to support an award for the tort of bad faith or of outrage. Nothing alleged or proved comes anywhere close to conduct which could be described as outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. The only actions taken by the appellant were in following appellee, having him followed or watched, and reporting that the appellee was working for a private corporation during the time he was supposed to be on duty for the police department. There was also testimony that appellant tried to have appellee discharged from the police department. The only disciplinary action taken against the appellee was the result of appellee's failure to tell the truth about one of the matters which was investigated as a result of appellant's complaint. There was no proof that any of appellant's complaints about appellee was untrue.

It is not outrageous as far as I am concerned for one person to try to keep up with what another is doing. If a policeman or other investigator had done the same things appellant did, no one would have had a second thought about it. Apparently a jealous spouse or sweetheart cannot check up on the other without it becoming an outrage. Lawyers may be handicapped in investigating certain claims as a result of the majority opinion. Appellant may well be guilty of interfering with a con-

tract of employment or slander but he is not guilty of outrage as we have previously defined the tort. Appellant may be guilty of invading the privacy of the appellee or several other recognized torts but his actions were not, in my opinion, utterly intolerable in a civilized society. The mischief done by the majority opinion far outweighs the good it will do.

Citizens may now be afraid to complain of conduct on the part of public officials or employees. Apparently they will now be obliged to keep their mouths shut about what they perceive as misconduct on the part of public employees or officials or face being sued for outrageous conduct.

We considered the tort of outrage in *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984) where this same instruction (AMI 2217) was given. We reversed because the instruction should not have been given. I believe the objection by appellant's counsel was proper and specific. Apparently he failed to utter magic words of some sort. If giving the instruction was reversible error in *Tandy* it should be reversible error here.

Reports of the police department investigations should not have been allowed. The introduction of these reports flies in the face of Unif. R. Evid. 803 (8) (i), (iv), and (v). I am not suggesting that these investigative reports were fabrications but they did result from special investigations by the police department and clearly came within the prohibitions of Unif. R. Evid. 803.

It is interesting to note in the report of Captain Daley that he characterized appellant as reflecting "a personality disorder of paranoid schizophrenia. This man demonstrated marked persecutory trends . . . ." Later he testified that he had only spoken with appellant once. Captain Daley also stated: "In all fairness to Mr. Hess and the parties involved, you could understand how he could be upset and distraught over a situation if he felt

he was making complaints and the complaints were not being addressed." This witness for the appellee did not view appellant's conduct as outrageous although he classified appellant as being paranoid and as having hallucinations. There is no basis for Captain Daley making these diagnoses. Even if this report was not prohibited by the rules its unfair prejudice far outweighed any probative value it might have had. Not a single witness nor collection of witnesses described conduct which is repugnant to a civilized society.

Appellee's testimony was that the frequent investigations caused him concern about his job. He stated appellant followed him in April, 1981, and that about a year later appellant informed appellee's supervisor that appellee was at an apartment when he was supposed to be at work. In April, 1982, appellant reported appellee was working at a private job during his normal duty hours. The ensuing investigation at least proved appellant's complaint was not unfounded. About the only other act complained of was that appellant paid others to report on appellee's conduct. Appellee's expressed fears for the safety of his family seem completely unfounded. There were never even any allegations of violence or threats to the appellee's family. There is nothing to prove that appellant even caused all the investigations to be initiated.

Even though there clearly was no proof of the tort of outrage I would send the case back for a new trial. There were allegations in the complaint which would support an award of damages on other grounds.

APPENDIX C

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1984, amongst others were the following proceedings, to-wit: On the 9th day of September, A.D. 1985, a day of said term

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No. 84-274

BOB HESS

Appellant

vs.

MARK TREECE

Appellee

Appeal from Pulaski Circuit Court Sixth Div. District

Petition for Rehearing is denied. Purtle, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 9th day of September, A.D. 1985.

/s/ Dona L. Williams, Clerk

APPENDIX D

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

No. 83-3240

MARK TREECE,

Plaintiff

vs.

BOB HESS,

Defendant

[Filed Apr. 24, 1984]

PRE-TRIAL ORDER

On this 16th day of April, 1984, came the parties herein, by and through their respective counsel, for a pre-trial conference.

After hearing statements of counsel and reviewing the pleadings in this case, the Court hereby enters the following pre-trial Order:

1. Plaintiff's slander cause of action will be withdrawn and not submitted to the jury for its consideration. Plaintiff has further indicated that he will attempt only to pursue his cause of action for intentional infliction of mental distress.

2. Plaintiff's motion to direct the production of Defendants tax returns for the past five (5) years is granted. However, Plaintiff's counsel is Ordered not to disclose the contents of the returns to any person other than an accountant for trial preparation only and any information obtained from the returns shall not be offered into evidence at trial until the Court decides preliminarily that a submissible issue of punitive damages has been established.

3. Both counsel, under a Protective Order, may examine a Little Rock Police Department investigative file previously examined by the Court for the purpose of determining the contents of said file. However, unless the Plaintiff convinces the Court within a reasonable time after examining the file that its contents, or the nature of the investigation, is relevant to the issues in this case, the subject matter may not be referred to or offered into evidence at trial.

IT IS SO ORDERED this 24th day of April, 1984.

/s/ David Bogard,
Circuit Judge

Approved:
/s/ Samuel A. Perroni

APPENDIX E

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

No. 83-3240

MARK TREECE,
Plaintiff

vs.

BOB HESS,
Defendant

[Filed Aug. 3, 1984]

MASTER'S REPORT

At the conclusion of a three-day trial on May 4, 1984, the jury returned a verdict for plaintiff Mark Treece in the amount of $75,000. Following the entry of judgment in favor of the plaintiff, defendant Bob Hess filed post-trial motions which included motions for a new trial and for judgment notwithstanding the verdict. By order entered June 14, 1984, the Court appointed Gordon S. Rather, Jr., as Special Master to consider the following motions and responses:

1. Defendant's motion for a new trial and the incorporated memorandum of law in support;

2. Defendant's motion for judgment notwithstanding the verdict;

3. Response to defendant's motion for a new trial;

4. Response to defendant's motion for judgment notwithstanding the verdict;

5. Defendant's motion for new trial based on newly discovered evidence;

6. Supplement to defendant's motion for new trial;

7. Response to defendant's motion for new trial based on newly discovered evidence; and

8. Response to defendant's supplemental motion for new trial.

After careful consideration of all the post-trial motions, responses, testimony presented on July 11, 1984, and all other matters of record, it is recommended that the Court enter an order allowing the jury verdict and the judgment entered thereon to stand.

FINDINGS AND CONCLUSIONS

Pursuant to Rule 53 of the Arkansas Rules of Civil Procedure, the following findings, conclusions and recommendations are submitted. This report deals separately with the motion for new trial and the motion for judgment notwithstanding the verdict.

* * * *

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT UNDER RULE 50 OF THE ARKANSAS RULES OF CIVIL PROCEDURE:

10. The defendant moves the Court for judgment notwithstanding the verdict on the ground there was no substantial evidence to support the verdict. To the contrary, the verdict was fully supported by the evidence, and this issue is for the appellate court on review of the entire record. It is impossible to reach a contrary decision in view of the damaging evidence introduced by the plaintiff during the course of the trial.

* * * *

CONCLUSION

An order should be entered denying the post-trial motions and allowing the defendant to appeal. The precedent for such an order is attached for the Court's consideration.

DATED July 16, 1984.

Respectfully submitted,

/s/ GORDON S. RATHER, JR.
Special Master

APPENDIX F

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

No. 83-3240

MARK TREECE,

Plaintiff

vs.

BOB HESS,

Defendant

ORDER

On this day this cause came before the Court for consideration of the pending post-trial motions together with the Master's Report. The Court concurs in the findings and conclusions contained in the Master's Report, and all of the recommendations in that report with respect to the post-trial motions will be accepted and adopted herein.

It is, therefore, ORDERED that the post-trial motions of defendant Bob Hess be and they hereby are denied. It is FURTHER ORDERED that the cost of preparing the transcript of proceedings held July 11, 1984, shall be and hereby is divided evenly between the plaintiff and defendant.

Gordon S. Rather, Jr., the Special Master appointed by this Court, is ordered discharged of any further duties and responsibilities in this action.

DATED August 3rd, 1984.

/s/ David Bogard
Circuit Judge

APPENDIX G

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

No. 83-3240

MARK TREECE,

Plaintiff

vs.

BOB HESS,

Defendant

COMPLAINT

Comes the plaintiff, Mark Treece, by his attorneys, Dobbs, Kidd, Ryan & Moore, and for his cause of action herein, alleges and states:

I.

The parties hereto are residents of Pulaski County, Arkansas, and the actions complained of herein occurred in Pulaski County, Arkansas.

II.

That the plaintiff, Mark Treece, is currently employed as a Little Rock Police Officer and has been so employed since March 26, 1973. That beginning on or about the 13th day of April, 1981, and continuing to the current date, the defendant, Bob Hess, has engaged in intentional, reckless, and outrageous conduct towards the plaintiff resulting in severe mental and emotional distress,

knowing that said conduct should cause or would cause emotional distress to such an extent that no reasonable man could be expected to endure it.

III.

That the defendant, Bob Hess, has contacted the plaintiff's supervisors on numerous occasions demanding investigation of the plaintiff's personal and professional conduct resulting in numerous unwarranted investigations and severe emotional distress as set forth herein.

IV.

That the defendant, Bob Hess, has continually molested and harassed the plaintiff by following the plaintiff on numerous occasions and placing him under constant surveillance after having been notified to discontinue such action, resulting in severe emotional distress as set forth herein.

V.

That the defendant, Bob Hess, has contacted numerous public officials in the City of Little Rock in an attempt to discredit plaintiff's reputation and in a willful and intentional attempt to encourage the Little Rock Police Department to terminate the plaintiff's employment.

VI.

That the defendant, Bob Hess, has made numerous slanderous statements to Little Rock Police Officers, public officials, and citizens of the City of Little Rock, said statements being untrue and detrimental to the plaintiff's character, resulting in the damages as set forth herein.

VII.

That as a result of the conduct set forth herein by the defendant, Bob Hess, the plaintiff, Mark Treece, has suffered compensatory damages in the sum of $250,000.00.

VIII.

That as a result of the defendant, Bob Hess', wilful, wanton, and intentional misconduct as set forth herein, the defendant, Mark Treece, should be assessed punitive damages in the sum of $100,000.00.

WHEREFORE, plaintiff, Mark Treece, prays that he have of and recover from the defendant, Bob Hess, judgment in the sum of $250,000.00 compensatory damages, $100,000.00 punitive damages, for his costs, herein expended, and for all other legal and proper relief.

DODDS, KIDD, RYAN & MOORE
313 West Second Street
Little Rock, Arkansas 72201

/s/ Judson C. Kidd
Attorney for Plaintiff

APPENDIX H

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

No. 83-3240

MARK TREECE,

Plaintiff

vs.

BOB HESS,

Defendant

FIRST AMENDMENT TO COMPLAINT

Comes Mark Treece, by his attorneys, Dodds, Kidd, Ryan & Moore, and for his First Amendment to Complaint, alleges and states:

I.

Plaintiff Complaint should be amended to add that the defendant, Bob Hess, contacted Captain Tim Dailey [sic], on or about March 2, 1982, threatening the plaintiff herein stating that the defendant would have the plaintiff's job at any costs and that the defendant herein would continue to conduct constant surveillance of the plaintiff.

II.

Defendant herein also contacted Lt. Albert Benefield with the Little Rock Police Department beginning in April of 1982, and continuing thereafter, making numerous unfounded complaints concerning the plaintiff's conduct as a Little Rock Police Officer and also placed the plaintiff under constant surveillance and intimidation.

III.

Further, that defendant herein contacted Lt. C. R. Watters, of the Little Rock Police Department, plaintiff's Patrol Division Shift Commander, and made numerous unfounded complaints and further, accused the plaintiff herein of immoral conduct.

V.

That defendant herein further contacted Mary Ann Haston for the purpose of placing the plaintiff under constant surveillance, contacting the plaintiff's wife in an effort to disrupt his marriage, borrowing Mary Ann Haston's personal property, clothing and wigs, disguising himself and surveilling the plaintiff so as to cause the plaintiff herein severe emotional distress.

VI.

Plaintiff readopts and realleges all allegations set forth in the original Complaint.

WHEREFORE, plaintiff prays that his Complaint be amended as set forth herein.

DODDS, KIDD, RYAN & MOORE
313 West Second Street
Little Rock, Arkansas 72201

/s/ Judson C. Kidd

Supreme Court, U.S.
FILED
JAN 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-974

In the Supreme Court of the United States

October Term, 1985

Bob Hess ..... *Petitioner*

V.

Mark Treece ..... *Respondent*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Attorneys for Respondent

Dated: January 8, 1986

QUESTION PRESENTED

Should the Court expand the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) to protect extreme and outrageous conduct that intentionally causes emotional distress.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page

Harlow v. Fitzgerald, ____ U.S. ____, 1025 S.Ct. 2727 (1982) 3

Hess v. Treece, 386 Ark. 434, 693 S.W.2d 792 (1985) 1, 2

Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir., 1978), rev'd on other grounds 443 U.S. 11 6

Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (1983) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6, 7

Readers' Digest Association, Inc. v. Superior Court, 690 P.2d 610 (1984) 6

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 6

Shenck v. United States, 249 U.S. 47 (1919) 7

St. Amant v. Thompson, 390 U.S. 727 (1968) 7, 8

Rules of the Supreme Court:

Rule 17(d) (c) 5

Other Authority:

Restatement of Torts 2d §46 5

No. 85-974

In the
Supreme Court of the United States

October Term, 1985

Bob Hess ..... *Petitioner*

V.

Mark Treece ..... *Respondent*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The respondent, Mark Treece, respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 386 Ark. 434, 693 S.W.2d 792 (1985) was reprinted as Appendix A to the Petition.

JURISDICTION

The respondent agrees with the jurisdiction statement contained within the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions as set forth in the petition adequately state the Constitutional provisions involved.

STATEMENT OF THE CASE

The respondent, Mark Treece, a Little Rock, Arkansas police officer filed a complaint against the petitioner, Bob Hess, in the Circuit Court of Pulaski County, Arkansas, on May 6, 1983, alleging the petitioner engaged in intentional, reckless and outrageous conduct toward the respondent resulting in severe emotional, and mental distress knowing that said conduct should cause, or would cause, emotional distess. Complaint ¶II.

Additionally the respondent alleged that the petitioner's " . . . wilfull, wanton and intentional misconduct warranted punitive damages." Complaint ¶VIII.

The respondent filed an amended Complaint adopting his original Complaint and further alleging that the petitioner had contacted Captain Daley stating that petitioner would have the respondents job at any cost and that petitioner would continue to conduct constant surveillance of the respondent; the petitioner contacted Lt. Benefield making numerous unfounded complaints concerning the respondents conduct as a police officer and had placed the respondent under constant surveillance; the petitioner contacted Lt. C.R. Watters and made numerous unfounded complaints and accused the respondent of immoral conduct. As a final allegation, the respondent alleged that the petitioner had contacted a Mary Ann Haston asking her to place the respondent under " . . . constant surveillance, to contact the respondent's wife in an effort to disrupt his marriage, and borrowed her clothing and wigs, disguising himself in surveilling the respondent so as to cause the respondent emotional distress." Amended Complaint ¶V.

The trial court instructed the jury that the respondent had to prove four propositions: that he sustained damages; that petitioner by extreme and outrageous conduct wilfully

or wantonly caused severe emotional distress to the respondent; that the conduct of the petitioner was the proximate cause of the respondents emotional distress; and that the emotional distress suffered by the respondent was so severe that no reasonable person could expect to endure it. (State trial transcript page 1018; hereafter referred as T.) The jury was also instructed that "when I use the term 'extreme and outrageous' conduct, I mean conduct that is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in civilized society." (T. 1020)

The evidence at the trial, unlike the manner in which it was characterized by the petition, did contain testimony that the petitioner knowingly made false reports concerning the respondent's official and unofficial conduct. The testimony of Mary Ann Haston was that the petitioner would make phone calls from her living room to the Police Department concerning Officer Treece which were clearly flase and that petitioner had asked her to make a false statement to the Little Rock Police Department concerning the respondent harrassing her. (T. 619, 621)

After being instructed on the tort of outrage and qualified privilege, as requested by the defendant, [1] the

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1

The defendant below asked for and received an instruction that provided a defendant cannot be held liable for engaging in conduct which he had legal right to. Private citizens have a legal right to complain in good faith to proper authorities about the conduct of police officers and to seek their removal from office. Further more, where a citizen has made a complaint about the conduct of a police officer, there is a presumption of good faith which the officer must overcome to make a case and the privilege includes complaints which may subsequently be found to be incorrect. (T. 1021-1022) Petitioner also obtained the benefit of the jury instruction which provided, "For any acts which may have occurred after January 1, 1983, you are instructed that the defendant is immune, that is, cannot be held liable unless plaintiff proves that defendant's conduct violated clearly established statutory or constitutional rights which a reasonable person would have known. *Harlow v. Fitzgerald*, ____ U.S. ____; 102 S.Ct. 2727, 2738 (1982). (T. 1023)

jury returned a verdict of $25,000.00 compensatory damages and $50,000.00 punitive damages.

The Arkansas Supreme Court found that petitioner's conduct clearly constituted outrageous conduct warranting the imposition of damages. (App. A. p. 6a of the Petition)

REASONS FOR DENYING THE PETITION

The case before the Court is not one of defamation as characterized in the petition, but one of intentional infliction of emotional distress. The case is factually unique and does not warrant review due to the lack of national importance.

The judgment of the Arkansas Supreme Court was correct under State law and did not violate the principle of New York Times v. Sullivan, 376 U.S. 254.

I

Under Rules (17)(1)(c) of this Court it is necessary that a case present facts of national importance. This case presents facts important to the two litigants involved and is unique to them. The Court is not being asked to apply the test of actual malice to a defamation case but is being asked to apply it to the tort of intentional inflication of emotional distress. The tort of intentional infliction of emotional distress as defined by the *Restatement of Torts*, 2d, §46, arises when "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another the subject for liability for such emotional distress, ..." The commentary to this section points out that, "liability has been found only where the conduct has been so outrageus in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Restatement of Torts* 2d, Sec. 46 (Comment (d)) the jury instructions given clearly defined the proof that respondent had to present to make this case in the terms of Sec. 46, *Restatement of Torts* and not in the terms of defamation. The Arkansas Supreme Court reviewed the sufficiency of the evidence based on the tort of intentional infliction of emotional distress and not that of defamation.

In contrast to the tort of intentional infliction of emotional distress, "(i)t is settled law that damage to

reputation is the fundamental concept of the law of defamation. The action turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation." *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933, 935 (1983).

"A Federal question raised by petitioner may be of 'a substance' in the sense that, abstractally considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues nor does it sit for the benefit of the particular litigants . . . 'special and important reasons' imply a reach to a problem beyond the academic or the eposidic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

The unique facts of this case clearly preclude it from being a vehicle to consider whether the actual malice test of *New York Times v. Sullivan*, Id., should apply to the evolving tort of intentional infliction of emotional distress. The facts show not just a one or two time incidence of verbal activity on the part of the petitioner, as was the case in *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir., 1978) and *Readers' Digest Association, Inc. v. Superior Court*, 690 P.2d 610 (1984) but a course of conduct over a three-year period of time directed toward the respondent. Police Captain Tim Daley testified that petitioner talked to him for over an hour on the phone during which he made many derogatory statements and further stated that he would cost the respondent his job at any cots. (T. 423-424) Captain Daley stated none of the complaints he knew of made by petitioner were found to be true. (T. 428) Police Lt. Albert Benafield testified that during a two to two-and one-half year period he had to single out the respondent on his daily worksheet to check on him because of complaints and that this constant checking caused the respondent problems emotionally. (T. 464-467) Lt. Benafield stated he knew of no wrongdoing on the part of respondent for over two years while the complaints were being made by the petitioner. (R.

487) Police Sgt. Watters testified that he was the supervisor of the respondent from 1978 through 1982; that he found no wrongdoing on the part of the respondent during that time even though he had to check on him repeatedly because of complaints made by the petitioner. (T. 499-507) Police Captain Ethridge testified that no other person besides petitioner made any complaints about the respondent's performance and that Captain Ethridge had to check on the respondent daily or weekly because of false complaints by the petitioner. (T. 523-530) A Miss Haston testified petitioner solicited her to call respondent's wife to make false claims that she was having an affair with respondent; (T. 622) that petitioner made a knowingly false statement to the Little Rock Police Department that respondent was harassing Miss Haston (T. 619); and that on numerous occasions, petitioner, while in her presence, would call to the police department making false claims about the respondent. The petitioner told Miss Haston he would spend every dime he ever made to get the respondent fired from his job and cause him as much misery as he could. (T. 621)

These facts show that the petitioner had not acted in good faith but with malice toward respondent. As this Court has pointed out, "neither lies nor false communication serve the ends of the First Amendment, and no one suggests their desirability or further proliferation." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

The " . . . protection of free speech would not protect a man from falsely shouting fire in a theater and causing a panic" and does not protect outrageous conduct such that was done by petitioner for over two and one-half years. *Shenck v. United States*, 249 U.S. 47, 52 (1919). This Court should not grant certiorari to review such outrageous conduct as was committed by the petitioner and should not use this case, under its unique fact situation, to determine if the actual malice test of *New York Times v. Sullivan* should be expanded to include a tort which already requires, by its

very terms, intentional or reckless conduct before liability attaches. The tort of intentional infliction of emotional distress encompasses actual malice as a necessary element that must be proved before recovery. Contrary to the petitioner's claim, there was more than ample evidence of actual malice since there was ample evidence of complaints being " . . . fabricated by the defendant" and being " . . . the product of his imagination". *St. Amant v. Thompson*, Id., 390 U.S. at 732.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT A. NEWCOMB, certify that a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI has been served on the attorney for petitioner, Kevin T. Baine, Stephen L. Urbanczyk, Robert W. Hamilton, 839 17th Street N.W., Washington, D.C. 20006, and Samuel A. Perroni, 1523 South Broadway, Little Rock, Arkansas 72202, by placing same in the United States Mail, this 8th day of January, 1986.

_____

ROBERT A. NEWCOMB

Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BOB HESS,

Petitioner,

v.

MARK TREECE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

---

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Bose Corporation v. *Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984) 2
Greenbelt Cooperative Publishing Association v. *Bresler*, 398 U.S. 6 (1970) 4
Old Dominion Branch No. 496 v. *Austin*, 418 U.S. 264 (1974) 4
New York Times v. *Sullivan*, 376 U.S. 254 (1964) .. 1, 2

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---

REPLY BRIEF OF PETITIONER

Respondent offers no argument or authority to support the proposition that speech concerning public officials loses the protection of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), merely because it is challenged under the banner of intentional infliction of emotional distress, rather than the traditional banner of defamation. The actual malice standard of *New York Times* applies to any claim for damages based upon criticism of official conduct. And the Ar-

kansas Supreme Court committed clear error in failing to recognize that basic principle.[1]

Respondent now attempts to save the judgment by arguing that there was evidence of actual malice under *New York Times* after all. No court or jury has made a finding of actual malice, however, and no court has made a determination that there is sufficient evidence to permit such a finding.[2] In fact, no court or jury has made any finding that Hess' complaints about Treece were even false. The only comment by anyone on that issue has been Justice Purtle's uncontested observation in dissent: "There was no proof that any of [Hess'] complaints about [Treece] was untrue." Petition App. B, at 15a. The record, in fact, establishes unmistakably that the

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[1] As respondent emphasizes, "[t]he Arkansas Supreme Court reviewed the sufficiency of the evidence based on the tort of intentional infliction of emotional distress and not that of defamation." Response to Petition for a Writ of Certiorari ("Response"), at 5. The Arkansas Supreme Court's error was in thinking there was a difference as far as the Constitution is concerned.

[2] Respondent's argument that "[t]he tort of intentional infliction of emotional distress encompasses actual malice as a necessary element," Response, at 8, is based on a misunderstanding of the *New York Times* standard. As this Court has repeatedly emphasized, the *New York Times* standard is not satisfied by proof of malice in the common law sense—i.e., ill will, intent to injure, or bad motives. See discussion and cases cited in the Petition for a Writ of Certiorari, at 14-15. *New York Times* requires proof that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corporation* v. *Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1965 n. 30 (1984). The officials who received Hess' complaints testified that there was nothing to indicate Hess did not sincerely believe them to be true. R. 436, 551-53, 566, 752.

statements upon which liability was based were true, and that Officer Treece was suspended by the police department for doing precisely what Hess said he was doing.[3]

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[3] Hess' principal complaint was that Treece was working at an off-duty job while on duty. As the Chief of Police testified at trial, after an investigation "it was determined that Officer Treece was working an off-duty job while he was on the payroll for the City of Little Rock and he subsequently was disciplined [suspended] for that." Arkansas Supreme Court Record ("R.") 753. Treece was also disciplined for giving a false statement in the course of the investigation and causing another officer to make a false statement. R. 721, 754, 776-77. The Arkansas Supreme Court's statement that Treece was suspended "primarily for giving a false statement to the investigators and not for working another job while on duty," Pet. App. A, at 6a, is incorrect. The Chief of Police, who imposed the suspension, testified unequivocally that it is "not fair to say" that Treece's false statement was "the main reason" why he was disciplined, and that "the suspension was administered for violating both of the rules [prohibiting leaving a place of duty without authorization and false statements]." R. 776-77. See R. 242-43.

Hess also reported that Treece was at his apartment while on duty. Treece was found to be in violation of department policy and reprimanded for one such incident. R. 429, 438-39, 447, 724-25. An inquiry into another such incident revealed that Treece was at his apartment as Hess reported, but had received clearance from his supervisor. R. 437-38. It was this latter incident that the Arkansas Supreme Court referred to when it said Treece was found "innocent" of this charge. Pet. App. A, at 2a.

Hess told the City Manager that Treece had harassed a Ms. Haston by accusing her and her boyfriend of selling drugs to him. R. 909-10. Ms. Haston testified that Hess' statement that Treece was "harassing" her was false. R. 619-23. As a

In short, the Arkansas courts have upheld an award of $75,000 in compensatory and punitive damages based upon truthful criticism of a public official. They have imposed liability without ever having assessed the evidence under the actual malice standard that the Constitution demands.

That the Arkansas courts' error is so clear should not deter this Court from correcting it. The right of the individual to criticize official conduct is the bedrock of our democracy, and this Court's unwavering protection of that right is the surest guarantee that it will be preserved.

This Court should grant the petition, and remand the case to the Arkansas Supreme Court for an assessment of the evidence of actual malice under *New York Times*. That action will reaffirm the principle

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matter of law, however, Hess' characterization of Treece's conduct as "harassment" was a rhetorical statement of opinion, not a "false" statement of fact. *See, e.g., Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Cooperative Pub. Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970). The underlying facts reported by Hess were true. Treece acknowledged that he told Ms. Haston he had information she and her boyfriend had been supplying drugs to Hess, and that she was upset at that accusation. R. 715. (Contrary to respondent's suggestion, Ms. Haston did not testify that any of Hess' other complaints were "false." She did testify that "as far as I know [the complaints about Treece's whereabouts] weren't valid," R. 621, but as noted above those complaints were in fact true.)

Hess' initial complaint was directed at another officer, Wheat, for charging dinners at a local country club to Hess' account, and wrecking an automobile that belonged to Hess. R. 439-40, 568, 749, 774. That complaint was also determined to be true, and Wheat was suspended as a result. R. 440, 750.

that criticism of official conduct is protected by the Constitution, regardless of the legal theory or label under which it is challenged.

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